Aim Edition Sdn Bhd v Ambank (M) Bhd (previously known as Amfinance Bhd)

HIGH COURT (SHAH ALAM) — SUIT NO 22NCVC-715–12 OF 2017
GUNALAN J
14 FEBRUARY 2019

Contract — Sale and purchase of land — Breach — Plaintiff purchased property under judicial sale by public auction — Plaintiff claimed breach by defendant — Plaintiff sought compensation from defendant — Whether there was subsisting contract between plaintiff and defendant — Whether there was breach of contract by defendant — Whether plaintiff had proven its damages as pleaded

This was a claim arising out of a judicial sale by public auction of immovable property wherein the plaintiff was the purchaser of the subject property ('the land') and was seeking compensation from the chargee bank ('the defendant') for breach of contract. The plaintiff claimed that they had 'discovered' there were four titles issued in respect of portions of the land and one future title was in the process of being issued. The plaintiff claimed that this gave rise to a shortfall in the area of the land it purchased and hence claimed for compensation against the defendant. The claim was primarily founded on breach of contract, specifically for breach of the terms and conditions contained in the proclamation of sale ('POS') as to the actual size of the land purchased by the plaintiff at the public auction. The issues for determination were: (a) whether there was a subsisting contract between the plaintiff and the defendant; (b) whether there was breach of contract by the defendant; and (c) whether the plaintiff had proven its damages as pleaded.

Held, dismissing the claim with costs:

(1) The plaintiff conceded that the defendant was not the vendor of the land. The alleged documents of contract as pleaded did not disclose any role by the defendant in the auction. Hence, no contractual nexus between the defendant and the plaintiff was shown in the transaction that took place. Moreover, the POS expressly referred to the sale by the registrar and not by the defendant. The defendant never offered any property for sale, not being the vendor, which meant that there was no question of the defendant's offer having been accepted by the plaintiff for the formation of a valid contract between them (see paras 17–18).

(2) The POS made no representation as to the size of the land per se but merely set out the particulars of the title. There was indisputably no error

in the particulars of title in the POS, which was an agreed and admitted document, relating to the title number and size/area of the land. Clause 6 of the conditions of sale in the POS explicitly placed the responsibility on the purchaser/vendor to ascertain the essential details of the land and ensured that the encumbrances and liabilities on the same were accurate. There was no representation or communication via the recitation of the particulars of title in the POS that the actual size of the land would correspond with the 94.76 hectares stated in the particulars. In view of the risk that the plaintiff took to purchase the property on an 'as is where is' basis, they should be estopped from claiming otherwise. There could be no doubt that the sale that took place was where the doctrine of caveat emptor would apply. The plaintiff chose not to ascertain that the description of the land size was accurate for the sake of commercial expediency. Hence, the plaintiff could not now find his claim on a shortfall in the land area (see paras 21–22, 26–27 & 31).

(3) No evidence was led and no witness was called to prove the monetary value of the shortfall and that the alleged shortfall acreage in monetary terms was worth RM16,165,681.80. It was trite law that a party claiming substantial damages was under a duty to prove that he suffered damages or losses, both the fact and quantum. Therefore, there was no prayer for damages to be assessed (see para 33).

[Bahasa Malaysia summary

Ini adalah tuntutan yang timbul daripada jualan kehakiman melalui lelongan awam harta tak alih di mana plaintif adalah pembeli hartanah ('tanah') dan meminta pampasan dari bank pemegang gadaian ('defendan') kerana melanggar kontrak. Plaintif mendakwa bahawa mereka telah 'menemui' terdapat empat hakmilik yang dikeluarkan berkenaan dengan bahagian tanah dan satu hakmilik sedang dalam proses dikeluarkan. Plaintif mendakwa bahawa ini menimbulkan kekurangan di kawasan tanah yang dibelinya dan dengan itu menuntut pampasan terhadap defendan. Tuntutan itu didasarkan terutamanya pada pelanggaran kontrak, khususnya untuk pelanggaran terma dan syarat yang terkandung dalam pernyataan penjualan ('POS') mengenai ukuran sebenar tanah yang dibeli oleh plaintif di lelongan awam. Isu-isu untuk pertimbangan adalah: (a) sama ada terdapat kontrak yang wujud antara plaintif dan defendan; (b) sama ada terdapat pelanggaran kontrak oleh defendan; dan (c) sama ada plaintif telah membuktikan ganti ruginya sebagaimana yang dipohon.

Diputuskan, menolak tuntutan dengan kos:

(1) Plaintif mengakui bahawa defendan bukan penjual tanah. Dokumen kontrak yang didakwa sebagai pengakuan tidak mendedahkan peranan defendan dalam lelongan. Oleh itu, tidak ada hubungan antara defendan dan plaintif yang ditunjukkan dalam transaksi yang berlaku. Selain itu,

POS secara jelas merujuk kepada penjualan oleh pendaftar dan bukan oleh defendan. Defendan tidak pernah menawarkan hartanah untuk dijual, bukan menjadi penjual, yang bermaksud bahawa tidak ada persoalan mengenai tawaran defendan yang telah diterima oleh plaintif untuk pembentukan kontrak yang sah di antara mereka (lihat perenggan 17–18).

(2) POS tidak membuat perwakilan mengenai ukuran tanah itu sendiri tetapi hanya menjelaskan butiran hakmilik. Tidak diragukan tiada kesalahan dalam butir-butir hakmilik dalam POS, yang merupakan dokumen yang dipersetujui dan diterima, yang berkaitan dengan nombor hakmilik dan ukuran/luas tanah. Klausa 6 syarat jualan di POS secara eksplisit meletakkan tanggungjawab kepada pembeli/vendor untuk memastikan butiran penting tanah dan memastikan bahawa beban dan liabiliti adalah tepat. Tiada perwakilan atau komunikasi melalui pembacaan butir-butir hakmilik dalam POS bahawa ukuran tanah yang sebenarnya sesuai dengan 94.76 hektar yang dinyatakan dalam butir-butir tersebut. Memandangkan risiko yang diambil oleh plaintif untuk membeli hartanah secara 'sebagaimana adanya', mereka harus dihindarkan daripada menuntut sebaliknya. Tidak ada keraguan bahawa penjualan yang berlaku adalah di mana doktrin caveat emptor akan berlaku. Plaintif memilih untuk tidak memastikan bahawa perihalan ukuran tanah adalah tepat untuk kepentingan komersial. Oleh itu, plaintif tidak dapat menemukan tuntutannya mengenai kekurangan di dalam kawasan tanah (lihat perenggan 21–22, 26–27 & 31).

(3) Tiada keterangan yang dikemukakan dan tidak ada saksi yang dipanggil untuk membuktikan nilai kewangan kerana kekurangan dan bahawa keluasan kekurangan yang didakwa dari segi kewangan bernilai RM16,165,681.80. Adalah undang-undang yang mantap bahawa pihak yang menuntut ganti rugi berkewajipan untuk membuktikan bahawa dia mengalami ganti rugi atau kerugian, kedua-dua fakta dan kuantum. Oleh itu, tiada permohonan agar ganti rugi dapat dinilai (lihat perenggan 33).]

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan [1990] 1 MLJ 317, HC (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)

Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-malaysian Finance Bhd & Anor [2003] 4 MLJ 447, CA (refd)

Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd [2016] 1 MLJ 165, FC (refd)

Santhi a/p Krishnan v Malaysia Building Society Berhad [2015] MLJU 2116; [2015] 1 CLJ 1099, CA (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147, HC (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777, FC (refd)
Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd [1995] 4 MLJ 673, HC (refd)

Legislation referred to

Evidence Act 1950 s 101
National Land Code ss 258(2), 269(3), Form 16F

Alan Chua Hock Kwang (Siva Ganesh and Geraldine Kenel with him) (Alan Chua & Co) for the plaintiff.
Vijay Kumar Natarajan (Chee Chun Yen with him) (Natarajan) for the defendant.

Gunalan J:

[1] This is a claim arising out of a judicial sale by public auction of immovable property wherein the plaintiff was the purchaser of the subject property (land) and now seeks compensation from the chargee bank for breach of contract.

[2] In the plaintiff's writ and statement of claim ('SOC'), the plaintiff prays for the following items of compensation:

(a) compensation in the sum of RM1,057,028.30 for Lot 3350 GM876;

(b) compensation in the sum of RM3,077,247.80 for Lot PT35818 HS(D) 33584;

(c) compensation in the sum of RM4,825,833.70 for Lot PT35819 HS(D) 35585;

(d) compensation in the sum of RM4,612,072.60 for Lot PT1512 HS(D) 58390;

(e) compensation in the sum of RM2,593,499.40 for lot having no title, but approved by the Pejabat Tanah Gombak;

(f) interest at 5%pa on the sum of RM16,165,681.80 from the date of filing of writ of summons and statement of claim until full realisation;

(g) costs; and

(h) any further and/or other reliefs that the court deems fit.

A FACTUAL BACKGROUND OF CLAIM

[3] In the defendant's written submission the material facts leading to this claim as summarised as follows:

B The Plaintiff was the successful bidder of the subject land at the third auction conducted in respect of this property. The 1st auction achieved a sale price of RM170,000,000.00 but was terminated when the successful bidder did not pay the balance purchase price. The 2nd auction achieved a sale price of RM190,000,000.00 and again, the successful bidder failed to pay the balance C purchase price within 120 days. Termination of that sale is currently being challenged and under litigation but is irrelevant to the matter before this Honourable Court.

However, at the 3rd auction, the Plaintiff was the sole bidder and was able to obtain the land at the opening reserve price of RM120,000,000.00. The Plaintiff's witness, D PW1 even admitted he was prepared to bid up to RM145,000,000.00. He however denied that he was by advised by a professional auctioneer or that he knew that previously the land had been successfully auctioned at RM190,000,000.00.

The land has since been transferred to the Plaintiff company. The Plaintiff is now claiming that they have 'discovered' there are four (4) titles issued in respect of E portions of the land and one (1) future title is in the process of being issued. The Plaintiff goes on to claim that this gives rise to a shortfall in the area of the land it purchased and hence claims for compensation against the Defendant which is the charge bank.

ISSUES FOR DETERMINATION

F

(a) whether there is a contract between the plaintiff and the defendant?

(b) whether the defendant breached the said contract?

(c) whether the plaintiff suffered a loss?

G (d) whether the 'as is where is basis' principle is applicable?

(e) whether the rule of 'caveat emptor' is applicable? and

(f) whether condition 23 is applicable?

H THE LAW APPLICABLE

[4] On the burden of proof in civil claims, the law was correctly stated in *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697; [1998] 1 CLJ Supp 147 by Augustine Paul JC (as he then was) as follows:

I It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it then the evidential burden shifts to the other party ... What shifts is the responsibility of adducing evidence to discharge that burden ... When the burden shifts to the other party it can be discharged by cross-examination of witnesses of the

party on whom the burden of proof lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him he will fail. If the party on whom the burden lies fails to discharge it the other party need not call any evidence. In that event it will not avail him to turn round and say that the respondent has not established his.

(See also s 101 of the Evidence Act 1950).

[5] In regard to the law on the doctrine of estoppel, in *Tenaga Nasional Bhd v Perwaja Steel Sdn Bhd* [1995] 4 MLJ 673 it was held:

It is my considered view that the defence of estoppel raised by the defendant has merits, and is supported by s 115 of the Evidence Act 1950 (Act 56) which reads as follows:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

The law of estoppel is clearly set out in *Sim Siok Eng v Government of Malaysia* [1978] 1 MLJ 15 (folld) wherein Lee Hun Hoe CJ said:

> ... the equitable principle stated by Lord Cairns in *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439 at p 448 in these words:
>
> ... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

[6] On the primary issue of whether there was a subsisting contract between the parties, the defendant, in support of its pleaded defence relied on the Supreme Court case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 which succinctly in detail states the legal position of the chargee in a judicial sale of a charged property. It was held:

We do not think that the above expression is intended to lay down the law that in a sale under s 256 of the National Land Code, the chargor renounces or surrenders all his proprietory rights in favour of the chargee, neither do we contemplate any transfer of such proprietary rights from the chargor to the chargee. The court makes

an order for sale at the request of the chargee after the chargor had failed to satisfy the court of the existance of a cause to the contrary. The order provides for certain conditions and procedures to be followed at the sale. The chargee's participation in this instance is only confined to the preparation of the conditions of sale in term of the order and the production in court of the issue documents of title — see s 258(2) of the National Land Code. On the other hand, the chargor is prevented by the court's order from denying the chargee's statutory right of sale, but he may nevertheless exercise his right as a proprietor to dispute any impropriety or anything done in breach of the statutory conditions of sale. In any event s 267(1)(a) of the National Land Code, which provides that the passing of the interest in the proprietary right from the chargor to the purchaser would occur on registration and after the issuance of a certificate given under s 259(a), clearly negates any such judicial proposition that the chargor abdicates his proprietary rights at that stage of the auction sales.

The legal position between the chargor and the chargee had been briefly referred to in the Federal Court case of *Mahadevan s/o Mahalingam v Manilal & Sons (M) Sdn Bhd* 10 at p 289 as follows:

> Our land law does not recognize a mortgage if it means a mortgage in the sense of English land law whereby the legal estate, ie ownership of the land is transferred to the mortgagee and what is left with the mortgagor is only an equitable right to redeem, known as equity of redemption. But our land law certainly recognizes a mortgagor in the sense of Torrens system, referred to by text written as Torrens Mortgage in which the mortgagor retains the legal ownership whilst the mortgagee acquires a statutory right to enforce his security.'

[7] For convenience, s 258(2) of the National Land Code ('the NLC') which was emphasised by the Supreme Court reads:

> (2) The charge on whose application the order was made shall — (a) prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the Court;

[8] The defendant also, in support of its position, referred to the book, Judith Sihombing *The National Land Code: A Commentary* at para 1261:

> The purchaser will have no relationship to the charge which would entitle the latter to pressure to make such payment because there is no contract between the chargee (who is not the Vendor of the land) and the Purchaser.

[9] The learned judge further added at paras 10503 and 10252 of the same book as follows:

> An additional factor of importance is that the chargee is not selling under the Code as owner, instead the court is ordering the sale and the chargee's role is simply the personage who initiated the sale and who hopes to receive the proceeds on the sale.
>
> When resorting to the statutory right of sale, the chargee is only able to sell the charged property in accordance with the terms of section 257 (and the order made

by the court) for he is not the owner of the land or lease or undivided share, the consequently he cannot pass title in it. At most, he is merely the conduit for the passing of title to the purchaser in that his application commences the action which results in the sale of the property.

[10] In conclusion, the learned author expressed this view:

Further, in Peninsular Malaysia it would seem that the charge is not the vendor because that role is assumed by the court or Land Administrator.

[11] The plaintiff, on the other hand, relied on a case decided in 1990, *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 VC George J (as he then was) held at p 319:

In a forced sale pursuant to s 256 of the National Land Code 1965, the chargee at whose instance the sale is effected is to be regarded as the vendor

... The sale takes place in terms of the order for sale made and the conditions of sale imposed 'in accordance with the order and any determination thereunder by the registrar of the court'. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement.

[12] The above proposition was endorsed by the Court of Appeal, in the case of *Mohamed Azmal Noor a/l Naina Mohd Noor v Arab-malaysian Finance Bhd & Anor* [2003] 4 MLJ 447, where Abdul Aziz Mohamad JCA (as he then was) held at p 455:

In the case of an order for sale of land charged under the National Land Code, VC George J (as he then was) held in *Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan* [1990] 1 MLJ 317 that the order for sale and the conditions of sale were to be regarded as the sale and purchase agreement between the chargee as vendor and the purchaser. Likewise I would regard the order for sale and the sale conditions in this case as the sale and purchase agreement between the respondents and the purchaser.

[13] The plaintiff pointed out that the above two decisions were referred to with approval by the Federal Court in *Ranjit Singh a/l Jarnail Singh v Malayan Banking Bhd* [2016] 1 MLJ 165 and the Court of Appeal in *Santhi a/p Krishnan v Malaysia Building Society Berhad* [2015] MLJU 2116; [2015] 1 CLJ 1099.

ANALYSIS AND FINDING

[14] From the evidence led by both parties, it was clearly shown and also undisputed that the whole purchase price (deposit of 10% and balance of 90%) was paid by the plaintiff to the defendant. On this basis, it was contended by

A the plaintiff that there was a contract between the plaintiff and the defendant as otherwise as otherwise the purchase price would not have been paid to and received by the defendant.

B **[15]** In essence, the crux of the present claim is that there is a concluded contract between the plaintiff and the defendant. This is purportedly in accordance with settled law that an order for sale and the conditions of sale constitute a sale and purchase agreement ('SPA') between the chargee as the vendor and the successful bidder as the purchaser.

C **[16]** On the primary issue of whether there was a subsisting contract between the plaintiff and the defendant the plaintiff relied on the proposition that the proclamation of sale, the memorandum and terms of sale as well as the *Borang* 16F were the documents that collectively constituted a contract between the plaintiff and the defendant as per para 13 of the statement of claim whereas the
D defendant contended that a perusal of these four documents would clearly show that this property was sold by the registrar and not the defendant. The defendant also pointed out that even the instrument of transfer (Form 16F) was executed by the registrar and not the chargee. Further, that:

E > There was not a single document that the Plaintiff had relied upon it its pleadings that showed that the Defendant was the Vendor. Therefore, it is clear that no contract between the Plaintiff and the Defendant for sale of the property even exists in the first place.

F **[17]** Among the important facts that emerged from the evidence regarding the sale by auction in this case are as follows. In the cross-examination of DW1 by the plaintiff's counsel, the line of questioning seemed to suggest that the plaintiff concedes that the defendant is not the vendor of the subject property. Second, the alleged documents of contract as pleaded do not disclose any role
G by the defendant in the auction. Hence, no contractual nexus between the defendant and the plaintiff was shown in the transaction that took place. Moreover, the proclamation of sale ('POS') expressly refers to the sale by the registrar and not by the defendant.

H **[18]** On the whole, the fundamental elements necessary under the law of contract for the formation of an enforceable agreement or contract are absent in this case on the facts relating to the present judicial sale by public auction. In short, the defendant never offered any property for sale, not being the vendor, which means that there was no question of the defendant's offer having been
I accepted by the plaintiff for the formation of a valid contract between them.

[19] The proposition that the registered chargee shall not be liable to pay compensation for losses arising from any judicial sale by public auction conducted under the provisions of the NLC is fortified by the words of s 269(3)

of the NLC which read:

> Notwithstanding anything contained in this Act or any other written law, the State Authority, any local authority, any charger or purchaser who suffers any loss or damage by reason of any act, omission, neglect, error or default arising under this Chapter shall be entitled to such compensation as may be determined by the Court.

[20] Proceeding to the issue of the alleged breach of contract by the defendant, what the plaintiff claims here is that the sale was for 94.76 hectares but that effectively, there has been encroachment on the land, hence cutting down its effective size by approximately 12.7655 hectares and hence, the plaintiff is entitled to be compensated. This is reflected in para 19 of the SOC which states, inter alia, that:

> ... kerana saiz hartanah yang sebenar yang dimiliki oleh Plaintiff adalah kurang daripada yang dinyatakan di Pengisytiharan Jualan.

[21] At this juncture, it is important to note that the POS make no representation as to the size of the land per se but merely sets out the particulars of the title. As pointed out by the defendant, the POS has accurately set out the particulars of the title which remain unchanged and undisputed up to today.

[22] The plaintiff's basic contention on this point is that the POS described the land as being of 94.76 hectares and this was a term of the alleged composite contract which the defendant says is a fundamental error and baseless presumption. The answer to this dispute could be found in what the POS says under the heading 'Particulars of Title'. There is indisputably no error in the particulars of title in the POS, which is an agreed and admitted document in this case under Part A, relating to the title number and size/area of the land — 94.76 acres.

[23] On the alleged breach of contract by the defendant, the plaintiff's case was that there was a representation by the defendant vide the POS that the land offered for sale by public auction comprised 94.76 acres. As contended by the plaintiff this is an incorrect interpretation given to the POS as what was stated in the POS was merely the details of the title without any representation as to the actual area of the land. Apart from the details of title in the POS, there was no evidence by the plaintiff that there was any other representation made by the defendant to this effect.

[24] On this ground, the defendant contended that the plaintiff had not discharged its onus of proof to prove this allegation by reference to s 101 of the Evidence Act 1950 which provides that:

> 101 Burden of Proof

A (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lied on that person.

B

[25] To conclude on this point, the crucial point is that, what the POS recites is the Particulars of Title of No 89881 and that until today remains accurate and correct.

C

[26] In any event, cl 6 of the conditions of sale in the POS explicitly places the responsibility on the purchaser/vendor to ascertain the essential details of the subject property and ensure that the encumbrances and liabilities on the same are accurate. PW1 did not dispute cl 6 but instead claimed that as the D auction was set to take place in three days he did not have the time to probe further to ascertain the actual size of the land offered for sale. As such, it would not be incorrect to say that there was a voluntary assumption of risk on the plaintiff's part that the description of acreage in the particulars of title may not have corresponded with the actual size on site (in view of the presence of E schools and overlapping titles).

[27] Importantly, it is undeniable that there was no representation or communication via the recitation of the particulars of title in the POS that the F actual size of the land would correspond with the 94.76 hectares stated in the particulars. In view of the risk that the plaintiff took to purchase the property on an 'as is where is' basis, they should be estopped from claiming otherwise.

[28] From the evidence and circumstances surrounding the auction sale, G there can be no doubt that the sale that took place was on the above basis where the doctrine of caveat emptor would apply. In the context of the instant case, the maxim requires that the purchaser is bound to view and inspect the land and make all searches at his own peril. If he does not. In the event that the actual acreage is found to be lesser than what is stated, he has to the consequences of H his failure or omission on the title, the charge, even if it is regarded as the vendor, cannot be held to be liable to the purchaser who offers to purchase the land on the said basis.

[29] The fact of the sale being on the aforesaid basis is fortified by cl 23 of the I conditions of sale which for convenience is reproduced below:

> 23. Hartanah yang Berjaya dilelong adalah dipercayai dan akan dianggap sebagai diperihalkan dengan betul dan dijual tertakluk kepada semua Ismen (easement), kaveat, tenansi, tanggungan, bebanan (encumbrances) dan hak (jika ada) yang wujud di atas atau terhadapnya yang timbul untuk mentakrif is masing-masing dan

tiada kesilapan kenyataan yang salah atau deskripsi yang salah akan membatalkan penjualan dan tiada bayaran gantirugi yang akan dibuat.

[30] Clause 23 is clear and unambiguous in its terms. As the land is being sold subject to the various interests mentioned therein, which would include titles issued on plots of land within the subject property, it would appear to preclude the plaintiff's present claim based on a similar situation. Secondly, no misstatement or misdescription would have the effect of annulling the sale nor would the purchaser be entitled to compensation for the same. From the wording the cl 23, the plaintiff's proposition that it only applies in respect of the right to annul the sale is clearly misconceived as the clause provides two rights to the seller as adverted to.

[31] I also upheld the defendant's contention that, from the proven facts in this case and PW1's admission that it was their responsibility to ascertain that the description of the land size was accurate but chose not to do for the sake of commercial expediency would clearly give rise to an estoppel by conduct. Hence, the plaintiff cannot now found his claim on a shortfall in the land area. Reference was made to the locus classicus on this area of the law, *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 where the Federal Court held:

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

[32] The Federal Court went on to say:

> The doctrine may be used to enlarge or reduce the rights or obligations of a party under a contract:
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> (1) Sarat Chunder Dey v Gopal Chunder laha LR 19 IA 203;
>
> (2) *Amalgamated Investment and Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84.

[33] Lastly, on the question of whether the plaintiff had proven its damages as pleaded, suffice to say that no evidence was led and no witness was called to prove the monetary value of the shortfall and that the alleged shortfall acreage in monetary terms was worth RM16,165,681.80. It is trite law that a party claiming substantial damages is under a duty to prove that he suffered damages or losses, both the fact and quantum. It must be noted that in this case there is no prayer for damages to be assessed. Reference needs to be made to only Augustine Paul in *Evidence Practice and Procedure* (4th Ed). At p 159:

> Duty on party claiming damages.

Before any award for damages can be made the party claiming it must prove both the fact of damage and the amount of damages.

Per Ong Hoch Thye FJ (as he then was) in *Guan Soon Tin Mining Co v Wong Fook Hun* [1969] 1 MLJ, 100 (FC):

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in Mayne & McGregor on Damages (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* (1948) 64 TLR 177 at 178:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'This is what I have lost: I ask you to give me these damages.' They have to prove it.

(See also *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777).

CONCLUSION

[34] To sum up, upon considering the pleadings, the evidence in its totality and the contentions of both parties through counsel, the court finds as follows on the plaintiff's ('P')'s claim.

[35] The claim is primarily founded on breach of contract, specifically for breach of the terms and conditions contained in the proclamation of sale ('POS') as to the actual size of the land purchased by P at the public auction (the subject land) conducted in accordance with the provisions of the National Land Code.

[36] Bearing in mind the law and established principles on burden of proof in civil actions, the onus lies wholly on P to prove the existence of a binding and enforceable contract between the two parties in this case. The outcome of this case depends primarily on the determination of this core issue.

[37] The sale in this case of the subject property is indisputably a judicial sale pursuant to an order for sale ('OFS') made by the High Court under the National Land Code ('the NLC'). In obtaining the OFS, the defendants/chargee bank was exercising its statutory rights under the NLC.

[38] It is settled law that in a judicial sale by public auction, the chargee bank in exercising its statutory rights is not regarded as the vendor in the sale. Hence, there is no relationship of vendor and purchaser between P and D in this case. It follows that there was, therefore, no contractual relationship between the parties in respect of the subject property. The vendor would be the High Court which carried out the sale through the registrar.

[39] Secondly, the purchaser is bound by the terms in the proclamation of sale upon making the offer to purchase the subject property. Inter alia, apart from stating the particulars of the title, there is no representation that the whole of the 94.76 hectares, without any structures/fixture of the land was offered for sale. It was a sale on an 'as is where is' basis subject to all encumbrances and interest.

[40] In the circumstances, as the existence of a contract between the parties has not been established and in view of the undisputed conditions of sale, P has clearly failed to prove the very basis of its pleaded claim on a balance of probabilities. This claim has, accordingly, to be dismissed with costs.

[41] Costs assessed in the sum of RM100,000, subject to allocator, to be paid by the plaintiff to the defendant.

Claim dismissed with costs.

Reported by Ahmad Ismail Illman Mohd Razali